Nos. 02-1472 & 03-853

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY G. THOMPSON, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents,

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH CIRCUIT AND FOR THE FEDERAL CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS SUPPORTING THE CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES

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Amicus the National Congress of American Indians respectfully submits this brief supporting affirmance of the judgment of the Federal Circuit in No. 03-853, and reversal of the judgment of the Tenth Circuit in No. 02-1472.[1]

INTEREST OF AMICUS

The National Congress of American Indians (NCAI) was founded in 1944 and is the oldest and largest tribal government organization in the United States. NCAI serves as a forum for consensus-based policy development among its membership of over 250 tribal governments from every region of the country. NCAI's mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments. NCAI and its members have considerable experience with the history and operation of self-determination contracts under the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), 25 U.S.C. §§ 450 *et seq.* NCAI submits this brief in order to help the Court understand the questions presented in a broader context framed by the unusual history of the ISDA, and the national policy of tribal self-determination.

SUMMARY OF ARGUMENT

These cases require construction of the funding provision of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450j-1. All agree that contracts the Secretary entered into with petitioners the Cherokee Nation and the Shoshone Paiute Tribes under that Act call, on the face of things, for the payment of "contract support costs" (CSCs) in amounts greater than the Secretary has yet paid.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than NCAI, its members or its counsel made any monetary contribution to the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this brief have been submitted to the Clerk.

[2] Although the Cherokee Nation is the respondent in No. 03-853, for simplicity we refer to both Tribes as petitioners.

The Secretary argues that he has no obligation to pay the additional amounts because the ISDA provides that contract funding "is subject to the availability of appropriations." 25 U.S.C. § 450j-1(b). As the Tribes' brief demonstrates, however, funds sufficient to pay the costs at issue in these cases were "available" within the ordinary meaning of that term as a matter of federal contracting and appropriations law. The Secretary's core argument is instead that the necessary appropriations were "not *meaningfully* 'available' to pay contract support costs." 03-853 Pet. 24 (emphasis added). By this he evidently means that it would have been difficult for him to fund full payment of petitioners' CSCs without either seeking more money from Congress, or cutting the agency's own budget in ways that he thinks would be "absurd." *Id.* In addition, the Secretary now seeks to rely on statutory language providing that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe under [the ISDA]." 25 U.S.C. § 450j-1(b).

Faced with such arguments, this Court might at first be inclined to defer to the interpretations and judgment of a federal Officer who has been charged by Congress with partial responsibility for administering the ISDA. In this case, that would be a perverse mistake. The ISDA is a cornerstone of the national policy of tribal self-determination, and is intended to transfer the responsibility and resources for operating federal Indian programs from federal agencies to tribal governments. Tracing the history of the ISDA from its enactment in 1975 through substantial amendments in 1988 and 1994 shows the unusual evolution of a statute under which Congress has repeatedly *stripped* the implementing federal agencies of discretion, largely because of Congress's conclusion that the agencies were protecting their own bureaucracies, rather than devoting available funds to advancing the goals of the ISDA. In particular, the history shows that Congress intended to place the Secretary under the strongest possible obligation to fully fund contract support costs—without measurable discretion, and even at the expense of the agency's own internal operations. And Con-

gress consciously chose to make the Secretary's obligations to ISDA Tribes enforceable against the agency to at least the same extent as other government contracts.

Against this backdrop, the only reasonable approach in this case is for the Court to enforce petitioners' contracts, and the ISDA, in accordance with their terms. Congress did not give the Secretary discretion to determine when funds are "available" to satisfy ISDA obligations. As between the Secretary and an ISDA Tribe, Congress placed the risk of any overall budgetary shortfall squarely on the Secretary—not the Tribes.

ARGUMENT

Through the ISDA, Congress has "directed" the Secretary to enter into a self-determination contract with any qualified Tribe that wishes to assume direct operation of a federal program that would otherwise be administered by the Secretary for the benefit of the Tribe and its members. 25 U.S.C. § 450f(a)(1). As amended in 1988 and 1994, the Act imposes very specific requirements concerning the funding that the Secretary must provide under such contracts. *Id.* § 450j-1. In particular, the funding must include an amount to cover "contract support costs," and "shall not be reduced by the Secretary to pay for Federal functions." *Id.* § 450j-1(a)(2), (b)(3).

These requirements are qualified by two provisos: The provision of funds is "subject to the availability of appropriations," and "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under [the ISDA]." *Id.* § 450j-1(b). The Secretary has argued that what funds are to be deemed "availab[le]," or what would cause a "reduc[tion]" in direct service, for purposes of Section 450j-1(b), must be left essentially to his discretion, based on his asserted need for flexibility in setting spending priorities for his agency. *See* 03-853 Pet. 17-20, 23-27; 02-1472 Br. in Opp. 16-17.

Because that argument may have a superficial plausibility, it is important for the Court to understand both the general policy of tribal self-determination that gave rise to the ISDA, and the very specific and unusual history of Congress's repeated efforts to reduce or eliminate agency discretion—in particular, discretion to pay for "Federal functions" rather than tribal contract support costs—and to compel faithful implementation of the Act. Against that background, it is clear that no argument based on secretarial discretion can provide a sound basis for construing the ISDA.

I. THE ISDA WAS ENACTED IN 1975 TO FURTHER A NEW NATIONAL POLICY OF TRIBAL SELF-DETERMINATION.

As this Court is well aware, federal policy concerning relations with the Indian Tribes has passed through many phases over time. *See, e.g.*, *United States* v. *Lara*, 124 S. Ct. 1628, 1634-1635 (2004). The important point for present purposes is that when the ISDA was enacted in 1975, it embodied a radical change in previous policies that had reflected at best an enervating federal paternalism, and at worst an express policy of terminating the legal recognition of tribal identity. In a landmark message to Congress in 1970, President Nixon called for a new approach, "explicitly affirm[ing] the integrity and right to continued existence of all Indian tribes."[3] Under the new regime, the United States would reaffirm its responsibility to Indian peoples, but it would increasingly seek to discharge that responsibility by rebuilding tribal leadership and institutions and pursuing government-to-government relationships with the Tribes. *See id.* at 1634; *Ramah Navajo Sch. Bd., Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 840 (1982) ("in the early 1970's the federal policy shifted toward encouraging the development of Indian-controlled institutions on the reservation"). This philosophy of tribal self-determination has provided the basis for federal Indian policy for the last 30 years.

[3] Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 567 (July 8, 1970); *see also, e.g.*, Felix S. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law* 180-206 (1982).

The self-determination policy found concrete expression in a number of new federal statutes—"most notably" the ISDA. *Ramah*, 458 U.S. at 840.[4] In enacting the ISDA in 1975, Congress found that:

> [T]he prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities[.]

Pub. L. No. 93-638, 88 Stat. 2203, § 2(a)(1), codified at 25 U.S.C. § 450(a)(1). It recognized the "obligation of the United States to . . . assur[e] maximum Indian participation in the direction of . . . Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities." *Id.* § 3(a), 25 U.S.C. § 450a(a). And it

> declare[d] its commitment to . . . the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by

[4] *See also* Cohen, *supra*, at 188-204 (discussing the ISDA and other "Self-Determination Era" statutes, such as the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341; the Indian Financing Act of 1974, 25 U.S.C. § 1451; and the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963).

the Indian people in the planning, conduct, and administration of those programs and services.

Id. § 3(b), 25 U.S.C. § 450a note; App. 1a.[5]

To give these goals practical form, Congress "directed" the Secretaries of the Interior and of Health, Education, and Welfare "to enter into a [self-determination] contract or contracts" with any qualified Tribe that so requested. *Id.* §§ 102-103, 88 Stat. 2206-2207; *see* App. 1a. These contracts were designed to transfer to the Tribe the responsibility and resources "to plan, conduct, and administer [federal] programs" that would otherwise be provided for Indians by the Secretaries, either directly or through similar contracts with States or state agencies. *Id.*

In keeping with this purpose, the Act included extensive provisions to facilitate the transfer of federal personnel to tribal supervision or employment. *Id.* § 105, 88 Stat. 2208-2210; *see* 25 U.S.C. § 450i & codification note. As to funding, it provided that the amount paid under each contract "shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof" covered by a contract. ISDA § 106(h), 88 Stat. 2211-2221; App. 3a. And as to administration, the Act generally gave the relevant Secretaries the usual broad discretion to determine how best to effectuate Congress's goals. *See id.* § 107(a), 88 Stat. 2212 (subject to certain consultation requirements and time limits, Secretaries "are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this title").[6]

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[5] For the Court's convenience, we have reprinted in an appendix to this brief selected provisions of the ISDA, as originally enacted and then as amended in 1988 and 1994.

[6] *See also, e.g., id.* § 106(a), 88 Stat. 2210 (contracts to be "in accordance with all Federal contracting laws and regulations except that ... the appropriate Secretary may waive any provisions ... which he determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of this Act"); *id.* § 108, 88 Stat. 2212 (contracting Tribes to submit annual report including "such other information as the appropriate Secretary may request").

It is important to emphasize that nothing in the ISDA was intended to transfer the ultimate responsibility for funding contracted programs from the federal government to the Tribes. These were still *federal* programs. What the ISDA aimed to change was the way that these federal programs were administered. It was a direction to the federal agencies that had been running them to turn their operation over, on request, to tribal governments—thus, necessarily, *pro tanto* reducing the agencies' own operations. Perhaps not surprisingly, that policy turned out to be more easily articulated than enforced.

II. THE ISDA'S UNUSUAL HISTORY DEMONSTRATES THAT CONGRESS PROGRESSIVELY CONSTRAINED SECRETARIAL DISCRETION IN AN EFFORT TO COMPEL PROPER IMPLEMENTATION OF THE ACT

A. In Its First Review Of The ISDA's Implementation, Congress Concluded That The Secretaries Had Maintained Excessive Federal Administration, While Failing To Reimburse Tribes For The Indirect Costs Of Administering Federal Operations

A dozen years after the initial enactment of the ISDA, Congress undertook a "comprehensive reexamination" of the Act. S. Rep. No. 100-274, at 1 (1988 Rep.).[7] That careful review of how the relevant Secretaries had implemented the statute during its first decade led to a number of pointed revisions to the legislation. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988 Amendments); *see* App. 4a-11a.

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[7] *See also Indian Self-Determination and Education Assistance Act Amendments of 1987: Hearing on S. 1703 Before the Senate Select Comm. on Indian Affairs*, 100th Cong. (Sept. 21, 1987) (*S. 1703 Hrg.*); *Indian Self-Determination and Education Assistance Act, Public Law 93-638: Hearings Before the Senate Select Comm. on Indian Affairs*, 100th Cong. (Apr. 22, 1987).

The Senate Report addressing the 1988 Amendments first noted that the ISDA was intended "to assure maximum participation by Indian Tribes in the planning and administration of federal services, programs and activities for Indian communities." 1988 Rep. 1.[8] While it praised the "remarkable progress" that Tribes and the relevant agencies had made toward that goal (*id.* at 6; *see id.* at 4-6), the Committee recognized that there had been significant problems with implementation of the Act (*id.* at 6-8).

To put these problems in proper context, the Committee recalled a sticking point that President Nixon had identified when he first called for a renewed self-determination policy: Before the ISDA, "when a decision [was] made as to whether a Federal program [would] be turned over to Indian administration, it [was] the Federal authorities, and not the Indian people who finally ma[d]e that decision." 1988 Rep. 3 (quoting [1970] Pub. Papers at 567). To reverse that historical reality, the ISDA had "uniquely require[d]" the relevant Secretaries to "transfer resources and control over [federal] programs to [requesting] tribe[s]." *Id.* at 6. There was, the Committee noted, "no other example of a Secretary being required to transfer resources to assist another governmental entity and simultaneously to divest itself of its own resources." *Id.* This already unusual situation had been exacerbated by "difficult federal budget pressures," under which "federal agencies and tribes ha[d] been competing for the same federal funds to carry out their respective responsibilities." *Id.* at 7.

Against this background, the Committee stressed that when Congress passed the ISDA, it "envisioned a clear-cut

[8] The 1988 amendments originated in the House of Representatives as H.R. 1223. The Senate Report addressed a companion bill, S. 1703. The Senate ultimately passed the House bill after amending it to conform in large part to the Senate bill. 134 Cong. Rec. 12860-12862 (1988). The House concurred in part in the Senate amendments, and the Senate accepted the House's changes. 134 Cong. Rec. 23335-23341, 24038-24043 (1988); *see* 102 Stat. 2298 legis. hist. note; 1988 U.S.C.C.A.N. 2620.

transfer [to Tribes] of federal responsibilities as well as federal financial, administrative, technical and other resources." 1988 Rep. 6. Looking back over the previous decade, however, the Committee identified two principal obstacles that had "interfered with the contractual relationship contemplated by the Act." *Id.* at 7.

First, although ISDA gave each Secretary the discretion to waive the application of federal contracting laws and regulations, *see* 88 Stat. 2210 (§ 106(a)); App. 2a, the Committee observed that instead the Secretaries' "inappropriate application of federal procurement laws and federal acquisition regulations to self-determination contracts ha[d] resulted in excessive paperwork and unduly burdensome reporting requirements." 1988 Rep. 7. This both unduly increased the cost of transferring functions under the Act (*see id.* at 7-8, 9), and meant that "[t]he federal service bureaucracy that was supposed to be reduced as tribes assumed control of programs [had instead] been replaced by a contract monitoring bureaucracy" (*id.* at 7). The Secretaries' decision to support this continued agency involvement led in turn to "budgetary allocations to cover federal pay costs, retirement costs and other federal needs," which reduced the funds available to the Tribes for the federal functions they had contracted to discharge, and "inject[ed] uncertainty into the planning and management of tribal programs." *Id.* at 8. In other words, rather than exercising their discretion to streamline the transfer of functions to tribal governments, the Secretaries had exercised it in a way that interfered with that transfer, while perpetuating the federal administrative establishment.

Second, the Committee identified "[p]erhaps the single most serious problem with implementation of the Indian self-determination policy" as "the failure of the [Secretaries] to provide funding for the indirect costs associated with self-determination contracts." 1988 Rep. 8; *see id.* at 8-13. The Committee explained (*id.* at 8-9):

> The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial

> management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. Tribal funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility.

In this regard, the Committee emphasized that under self-determination contracts, Tribes were "operating federal programs and carrying out federal responsibilities." 1988 Rep. 9. They "should not be forced to use their own financial resources to subsidize federal programs." *Id.* Moreover, to the extent that contracting with Tribes might entail additional administrative costs at the *tribal* level, the Committee recognized that such expenditures, unlike money spent on administration by federal agencies, directly served a "fundamental objective of the federal policy of Indian self-determination," which is "to increase the ability of tribal governments to plan and deliver services appropriate to the needs of tribal members." *Id.* at 5; *see id.* at 4 (improvement in tribal government administrative capabilities was financed in part by "indirect cost reimbursement associated with self-determination contracts"); *id.* at 11 (discussing report by Interior Department's Inspector General). Finally, the Committee repeatedly faulted the Secretaries for "fail[ing] to request from Congress the full amount of funds needed to fully fund indirect costs associated with self-determination contracts." *Id.* at 9; *see id.* at 12, 13.

In sum, the Committee expressed exasperation with the way that the Secretaries had administered the largely discretionary funding provision in the original ISDA, which required only that contract funding be "not less than" the amount a Secretary would have provided for his "direct operation" of a program (88 Stat. 2211 (§ 106(h)); App. 3a):

> The Federal Government would not consider it proper to short-change funding for contracts with private suppliers of goods and services. When the Bureau of Indian Affairs and the Indian Health Service contract with Indian tribes, however, they routinely fail to reimburse tribes for legitimate administrative costs associated with carrying out federal responsibilities. Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.

1988 Rep. 13.[9] In response, it declared its intention to amend the ISDA in a manner specifically designed "to require the [Secretaries] to comply with the requirement of the Act that indirect costs be added to the amount of funds available for direct program costs." *Id.* at 12.

B. The 1988 Amendments Cut Back Sharply On Secretarial Discretion Regarding The Administration And Funding Of ISDA Contracts

The 1988 Amendments themselves directly reflect Congress's concern with the Secretaries' (i) excessive preservation of a federal administrative structure and (ii) failure to provide adequate funding for the indirect costs incurred by Tribes in administering contracted federal operations.

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[9] *See also S. 1703 Hrg.* 55 (statement of Chairman Inouye) ("A final word about contracts: I am a member of the Appropriations Committee, and there we deal with contracts all the time. Whenever the Department of Defense gets into a contract with General Electric or Boeing or any one of the other great organizations, that contract is carried out, even if it means supplemental appropriations. But strangely in this trust relationship with Indians they come to you maybe halfway or three quarters through the fiscal year and say, 'Sorry, boys, we don't have the cash, so we're going to stop right here' after you've put up all the money.").

1. Distinguishing Between Tribal And Federal Administrative Costs

To begin with, the amendments added a new sentence to the Act's "declaration of policy": "In accordance with this policy [of self-determination], the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 1988 Amendments § 102, 102 Stat. 2285 (amending ISDA § 3(b), 25 U.S.C. § 450a(b); App. 4a). This newly articulated commitment reflects Congress's express understanding that ISDA funds spent on the indirect costs that tribal governments incur in administering federal contracts directly serve the ISDA's purpose of enhancing tribal self-determination. The same cannot, of course, be said of federal agencies' administrative costs.

Along the same lines, Congress consolidated what were originally separate sections dealing with the Secretary of the Interior and the Secretary of Health, Education, and Welfare (by 1988, Health and Human Services). 1988 Amendments § 201, 102 Stat. 2288 (amending ISDA § 102 and repealing or redesignating § 103); App. 6a-7a. The two original sections had used different wording to describe the scope of an ISDA contract. *Compare* ISDA § 102(a), 88 Stat. 2206 ("to plan, conduct, and administer programs"), *with id.* § 103(a), 88 Stat. 2206-2207 ("to carry out any or all of his functions, authorities, and responsibilities under the Act of August 5, 1954," which transferred Indian health programs to the Public Health Service). In combining the two provisions, Congress clarified and expanded the scope of "programs" potentially covered, and selected the "plan, conduct, *or administer*" language to describe the nature of the contracts. 1988 Amendments § 201, 102 Stat. 2288 (emphasis added) (codified as later further amended at 25 U.S.C. § 450f(a)(1)); App. 6a. The Senate Committee explained its intention to make clear that "administrative functions of the Indian Health Service are contractible," that the Secretaries

were "not to consider any program or portion thereof to be exempt from self-determination contracts," and that contracted operations could include a wide range of administrative tasks that would otherwise be performed by the agencies at the "Area Office, Field Office, Agency and Service Unit" levels. 1988 Rep. 23-24. In short, Congress was focused on the transfer—not the preservation—of federal administrative functions.

2. Eliminating Unnecessary Federal Administrative Requirements

The 1988 Amendments also struck at the Secretaries' failure to use their authority to exempt ISDA contracts from federal procurement procedures, and the corresponding failure to realize expected reductions in federal administrative costs as operations were shifted to tribal administration. *See* 1988 Rep. 7. In amending the Act's definitions, Congress specified that "no contract entered into pursuant to this Act shall be construed to be a procurement contract," 1988 Amendments § 103, 102 Stat. 2286 (adding ISDA § 4(j)), in order to "make[] clear . . . that the system of federal acquisition regulations . . . should not apply to self-determination contracts," and in the hope that "the federal contract monitoring bureaucracy that has replaced the federal service bureaucracy [would] be greatly reduced over the next three years," 1988 Rep. 18-19. Similarly, in the section addressing contract administration, Congress added a proviso specifically directing that except for construction contracts, "the Office of Federal Procurement Policy Act . . . and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contracts." 1988 Amendments § 204, 102 Stat. 2291 (redesignating and amending ISDA § 105(a), codified as later further amended at 25 U.S.C. § 450j(a)).

In addition, in three places Congress mandated that any federal administrative requirement for entering into or monitoring ISDA contracts, including record-keeping and reporting requirements, must be promulgated through notice-and-comment rulemaking. 1988 Amendments §§ 104, 207,

and 208, 102 Stat. 2287, 2295, 2296 (amending and redesignating ISDA §§ 5, 107, and 108, codified as later further amended at 25 U.S.C. §§ 450c, 450k, and 450c(f)); *see* App. 5a, 10a. As the Senate Committee explained at some length, these amendments were intended in part "to prevent Federal agencies from imposing unnecessary contract compliance and reporting requirements on tribal contractors through the use of administrative policy directives," internal manuals, and the like. 1988 Rep. 20; *see id.* at 20-22, 39. They also provided a framework and schedule for the Secretaries to cooperate with Tribes in developing appropriate regulations to replace the cumbersome procurement rules that the Secretaries had previously applied. *Id.* at 38. The Committee specifically noted its expectation that the new regulations would be "relatively simple, straightforward, and free of unnecessary requirements o[r] procedures." *Id.* The Act itself required that they be promulgated within 10 months. 1988 Amendments § 207(b), 102 Stat. 2295-2296 (amending ISDA § 107(b), codified as later further amended at 25 U.S.C. § 450k(b)).

3. Contract Funding

As to the central question of contract funding, the 1988 Amendments replaced the original Act's one-sentence subsection dealing with funding with a lengthy new section of the Act, largely concerned with contract support costs. 1988 Amendments § 205, 102 Stat. 2292 (adding ISDA § 106, codified as later further amended at 25 U.S.C. § 450j-1); App. 8a-9a. The original provision had merely specified that contract funding must "not be less" than the relevant Secretary would have spent on a contracted operation—essentially leaving other funding questions to the relevant Secretary's discretion. ISDA § 106(h), 88 Stat. 2211.

In stark contrast, the new provision specifically recognized that contracting Tribes would incur CSCs, and required that those costs "be added to" the base funding amount. *See* 25 U.S.C. § 450j-1(a)(2). It further set out, in remarkable detail, a number of grounds that a Secretary was specifically *prohibited* from advancing as justifications for

reducing the contract funding provided to a Tribe. *See* 25 U.S.C. § 450j-1(b). These forbidden grounds included "mak[ing] funding available for contract monitoring or administration by the Secretary"; "pay[ing] for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring"; and "pay[ing] for the costs of Federal personnel displaced by a self-determination contract." *Id.*

The amendments thus imposed strict statutory prohibitions against what had previously been treated as funding allocations lying within the Secretaries' discretion. They also added several provisions addressing specific indirect-cost issues, including requiring the Secretary to submit an annual report to Congress that was to detail, among other things, "any deficiency of funds needed to provide required indirect costs to all contractors for [each] fiscal year." *See* 1988 Amendments § 205, 102 Stat. 2293 (adding ISDA § 106(c)-(i), including § 106(c)(2), codified as later further amended at 25 U.S.C. § 450j-1(c)-(i), including § 450j-1(c)(2)). And they introduced the two limited qualifications at issue here: "the provision of funds under this Act is subject to the availability of appropriations," and "the Secretary is not required to reduce funding for programs, projects, or activities *serving a tribe* to make funds available to another tribe" under the ISDA. 25 U.S.C. § 450j-1(b) (emphasis added).

As the Senate Report confirms, these changes were intended to "protect[] contract funding levels provided to tribes, and prevent[] the diversion of tribal contract funds to pay for costs incurred by the Federal government." 1988 Rep. 30; *see id.* at 30-34.

4. Contract Enforcement

A final significant aspect of the 1988 Amendments here is Congress's approach to the question of contract enforcement. The Senate Report indicates that the Committee:

> considered deleting the term "contract" and using another term such as "self-determination grant" or

> "intergovernmental agreement." Ultimately, however, the Committee determined that the use of the term "contract" is important to convey the sense of a legally binding instrument that cannot be terminated by administrative action without the legal consequences that would be associated with the termination of contractual obligations by either party.

1988 Rep. 19. Indeed, the 1988 Amendments reinforced the contractual nature of ISDA funding, adding to the statute a new section expressly providing for application of the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, and judicial enforcement in either district courts or what is now the Court of Federal Claims. 1988 Amendments § 206, 102 Stat. 2294-2295 (adding ISDA § 110, codified as later further amended at 25 U.S.C. § 450m-1); App. 11a.

These provisions substantially strengthened the remedies available to ISDA Tribes. The Senate Committee made clear that it believed they were "necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the [ISDA]." 1988 Rep. 37. Indeed, the Committee put the point bluntly:

> The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations.

Id. It illustrated its discussion with an example involving inadequate funding that, in the Committee's view, was the product "not . . . of a Congressional appropriation shortfall, but of a unilateral decision by the BIA" (*id.*)—that is, a decision the agency no doubt believed fell within its administrative discretion.

In sum, the history and substance of the 1988 Amendments demonstrate that Congress: (1) was frustrated by the

Secretaries' tendency to perpetuate an undue federal administrative role under the ISDA; (2) expressly directed the Secretary to pay for contract support costs, subject only to the availability of appropriations and the no-reduction clause; and (3) purposefully gave ISDA Tribes the right to pursue powerful contract remedies. These amendments substantially constrained the administrative discretion that the Secretaries had previously exercised in implementing the ISDA. They were, however, "necessary in order to meet the challenge presented by the tribes: to fully support the successful implementation of the federal policy of Indian Self-Determination." 1988 Rep. 13.

C. The 1994 Amendments Reflect Congress's Final Decision To Eliminate Executive Discretion With Respect To ISDA Contracts

In 1994, Congress again reviewed the Secretaries' performance in implementing the ISDA. It did not like what it found.

The 1994 Senate Report tersely recalls the same Committee's 1988 conclusion that the ISDA had "failed to meet its goal of reducing the federal bureaucracy and ending the federal domination of Indian programs," and had instead "spawned an increase in federal officials who were employed to monitor self-determination contracts." S. Rep. No. 103-374, at 2 (1994) (1994 Rep.). The 1988 amendments had been required because "the original goal of ensuring maximum tribal participation in the planning and administration of federal services" had been "undermined by excessive [federal] bureaucracy and unnecessary contract requirements." *Id.*

In 1988, Congress had acted to "remove . . . administrative and practical barriers." 1994 Rep. 2. The Committee had expected new implementing regulations to be issued quickly, and to be "relatively simple, straightforward, and free of unnecessary requirements." *Id.* (internal quotation marks omitted). Yet, despite the fact the statute (not just a Committee report) required that those regulations be issued within 10 months (*see* 1988 Amendments § 207, 102 Stat.

2296 (enacting ISDA § 107(b)(4))), the Secretaries had not published even proposed regulations until January 20, 1994. Moreover, those proposed rules contained "hundreds of new requirements," and were in many instances "more restrictive than existing regulations and raise[d] new obstacles and burdens for Indian tribes." 1994 Rep. 3 (internal quotation marks omitted); *see also id.* at 14 (Secretaries "fail[ed] . . . to respond promptly and appropriately to the comprehensive amendments developed by this Committee six years ago. . . . It is this unfortunate experience that is a major impetus for this bill.").

Congress's reaction was unequivocal. Disregarding the Executive's "strong[] oppos[ition]" (1994 Rep. 16), it passed a second extensive revision of the ISDA. Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, tit. I, 108 Stat. 4250 (1994 Amendments); *see* App. 12a-20a. The changes addressed familiar concerns, but with a new unwillingness to entrust any part of their resolution to secretarial discretion.

The original ISDA, for example, had required contracting Tribes to submit annual reports including "such . . . information as the appropriate Secretary may request." ISDA § 108, 88 Stat. 2212; App. 3a. The 1988 Amendments attempted to restrain the burdensomeness of such "request[s]" by requiring that they be made through public rulemaking. 1988 Amendments § 208, 102 Stat. 2296; App. 5a. In 1994, Congress simply specified one particular form of required audit. 1994 Amendments § 102(2), 108 Stat. 4250-4251 (codified at 25 U.S.C. § 450c(f)); App. 12a. Beyond that, the Secretary may collect additional information only to the extent he is able to "negotiate" such a requirement with the tribal contractor. *Id.*

Similarly, the 1988 Senate Report had indicated an intent that the Secretaries accept tribal proposals to contract for administrative functions, no matter at what organizational level the Secretary would have performed them. 1988 Rep. 23-24. The 1994 Amendments spelled the requirement out in statutory text—indeed, in two key places. *See* 25

U.S.C. § 450f(a)(1), as amended by 1994 Amendments § 101(5), 108 Stat. 4251 ("The programs, functions, services, or activities that are contracted . . . shall include administrative functions . . . without regard to the organizational level within the [federal] Department that carries out such functions.") (App. 13a); 25 U.S.C. § 450j-1(a)(1), as amended by 1994 Amendments § 102(14), 108 Stat. 4257 (contract funding "shall not be less than the . . . Secretary would have otherwise provided for the [contracted] operation . . . without regard to any organization level within the [federal] Department . . . at which the [operation] . . . , including supportive administrative functions that are otherwise contractable, is operated") (App. 16a).[10]

The 1994 Amendments also substantially tightened direct statutory control over the standards and process under which the Secretary may decline to enter into an ISDA contract proposed by a Tribe. *See* 1994 Amendments § 102(6)-(7) and (9), 108 Stat. 4251-4253 (amending or adding ISDA § 102(a)(2) and (4), (b)(3), and (e), codified as later further amended at 25 U.S.C. § 450f(a)(2) and (4), (b)(3), and (e)); App. 13a-15a. For example, the amended Act now requires the Secretary to base any such decision on "controlling legal

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[10] These amendments addressed a particular source of frustration for Tribes seeking to contract for services: the practice of contracting only field-office operations, thereby protecting federal agency area-office and headquarters operations. Despite forceful discussion in the 1988 Senate Report specifically indicating that Tribes should be able to contract to perform all IHS functions related to a program, including functions performed at area offices and headquarters, *see* 1988 Rep. 23-24, the 1994 proposed regulations threatened to reinforce the historical practice. They defined the operative term "program" narrowly as the "operation of services for tribal members and other eligible beneficiaries," and asserted that "the legislative history . . . indicates that what Congress intended by the term program was the operation of services." 59 Fed. Reg. 3167 (Jan. 20, 1994); *see id.* at 3179, § 900.102. Although the regulations left open the theoretical possibility that some programs "might be performed at higher organizational levels," they "emphasize[d] that service delivery programs subject to contracting are generally performed at the reservation level." *Id.* at 3168; *see id.* at 3181, § 900.106(c).

authority" or on specific evidence "clearly" demonstrating a statutory ground for declination; to approve any severable portion of a proposal; and to carry "the burden of proof to establish by clearly demonstrating the validity of the grounds for declining." 25 U.S.C. § 450f(a)(2) & (4), (e)(1). Moreover, if a Tribe's contract proposal is declined in whole or in part—or if, as had happened in the past, the Secretary purports to approve a request, but then does not take the steps necessary to implement the contract—the Tribe may bypass any administrative appeal and proceed straight to district court, seeking "immediate injunctive relief to reverse a declination finding . . . or to compel the Secretary to award and fund an approved self-determination contract." 25 U.S.C. §§ 450f(b)(3) and 450m-1(a), as amended by the 1994 Amendments §§ 102(7) & 104(2), 108 Stat. 4252, 4268; App. 14a, 18a.

Perhaps most strikingly, Congress gave up waiting for the Secretaries to promulgate appropriate terms and conditions for ISDA contracts, and simply prescribed a statutory form of contract itself. *See* 1994 Amendments § 103, 108 Stat. 4260-4261 (enacting ISDA § 108, codified as later further amended at 25 U.S.C. § 450*l*); *see also* 1994 Rep. 3. In that prescribed form, it included a special and sweeping rule of construction:

> Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the . . . related functions, services, activities, and programs (or portions thereof) [listed in the Contract], that are otherwise contractable under section 102(a) of such Act [25 U.S.C. § 450f(a)], *including all related administrative functions*, from the Federal Government to the Contractor[.]

25 U.S.C. § 450*l*(c), sec. 1(a)(2) (emphasis added). Moreover, having settled these matters itself, Congress expressly stripped the Secretaries of any authority to "promulgate any

regulation, [or] impose any nonregulatory requirement, relating to self-determination contracts"—with the exception of one unified set of regulations, addressing only specified topics and vetted with Tribes through a "negotiated rulemaking" process, if but only if the final regulations were promulgated within 18 months (later expanded to 20 months) after enactment of the 1994 Amendments. *See* 1994 Amendments § 105, 108 Stat. 4269 (amending ISDA § 107, codified as later further amended at 25 U.S.C. § 450k); App. 19a-20a; *see also* 1994 Rep. 14 ("Beyond the areas specified . . . , no further delegated authority is conferred.").

In short, after the 1988 and 1994 Amendments, it would be difficult to find a context in which it would be *less* persuasive for the government to argue for any degree of deference to a federal Officer's exercise of discretion in the construction or implementation of a federal statute.

III. In Light Of The ISDA's History, Its Funding Provisions Cannot Be Construed To Make Reimbursement Of Tribal Contract Support Costs Depend On The Secretary's Discretionary Decisions Concerning The Funding Of Federal Administrative Costs

It is against this background that the Secretary now resists the Federal Circuit's conclusion that he is contractually bound to pay the contract support costs at issue in these cases. In doing so, he seizes on the only language he can in the ISDA: the "availability" and "reduction" clauses of 25 U.S.C. § 450j-1(b).

The Secretary's core argument is that the ISDA allows him to decide what amounts he needs for purposes of his own administrative establishment, and to treat only whatever is left over as "availab[le]" to fund both ISDA contracts and direct services to other Tribes. *See, e.g.*, 03-853 Pet. 24 (funds needed for Secretary's own functions not "meaningfully" available to satisfy ISDA contract obligations); *id.* at 26 (decision to use appropriated funds to pay for "federal functions" rather than contract obligations did not " 'reduce' funding to the Tribes" because the Secretary "never . . . treated [those funds] as available to pay for [contracted]

services . . . to begin with"). This is, in effect, an argument that the Secretary must have the discretion to make difficult trade-offs between tribal and federal administrative costs, in the context of overall budgetary constraints. *See id.* at 17 (both Secretary and Tribes must be "constrained by the . . . [Secretary's] need to allocate funds among competing needs"); 02-1472 Br. in Opp. 16 (" 'availability' should be read" to mean "practical availability," "in view of competing claims and priorities" as determined by the Secretary). Yet, as we have described, the whole history of the ISDA demonstrates beyond question that that is precisely the sort of decision that Congress has concluded it *cannot* safely entrust to the discretion of federal administrators.[11]

A. The Governmental Nature Of ISDA Contracts Does Not Undermine Their Enforceability

The Secretary argues in part that because ISDA contracts are "governmental funding arrangements," rather than "procurement contracts," they are "constrained by . . . the need to allocate funds among competing needs." 03-853 Pet. 17. In the Secretary's view, of course, he is the one to determine the necessary "allocat[ion]." There is, however, more than a little irony in the Secretary's invocation of the government-to-government nature of ISDA agreements as an argument to support limiting reimbursement of tribal administrative costs.

As the history discussed above demonstrates, in 1988 the Senate Indian Affairs Committee also stressed "the

[11] In *Ramah Navajo School Board, Inc.* v. *Babbitt*, 87 F.3d 1338, 1345-46 (1996), the D.C. Circuit considered an IHS formula for allocation of limited funds, which reduced the amount available to Tribes that missed an agency-imposed deadline for submitting contract requests. Rejecting an argument based in part on the availability clause, the court held that the Secretary had no discretion to impose the penalty formula, in light of Congress's "irritation" with the ISDA funding agencies' " 'failures to administer self-determination contracts in conformity with the law,' " and its consequent decision to deny the agencies any discretion with respect to ISDA contract funding. *Id.* at 1345.

unique nature of self-determination contracts between the Federal Government and Indian tribal governments." 1988 Rep. 18. The Committee was explaining why the Secretaries had erred in failing to exercise their discretion to exempt ISDA contracts from most federal procurement rules, instead replacing the "federal [Indian] service bureaucracy" with a "federal contract monitoring bureaucracy." *Id.* at 18-19. Congress's response to that federal administrative failure was to amend the statute itself to make clear that ISDA contracts are not "procurement" contracts, and that they should not be subjected to burdensome procurement rules. *See* pp. 12-13, *supra*. At the same time, although it considered changing the statutory term "contract" to something such as "intergovernmental agreement," the Committee ultimately retained the term "contract" because that term was "important to convey the sense of a *legally binding instrument*." 1988 Rep. 19 (emphasis added). Indeed, the 1988 Amendments added important provisions designed to confirm and enhance not only the mandatory inclusion of CSCs in the funding for ISDA contracts, but the *enforceability* of those contracts *as contracts*. *See* pp. 15-16, *supra*; 25 U.S.C. § 450m-1(a), (d). The Secretary's present argument for greater flexibility to *reduce* his obligations under ISDA "governmental funding arrangements" (03-853 Pet. 17), because of his own determinations about the need to maintain his own administrative apparatus, runs completely counter to Congress's intentions.

B. Congress Did Not Give Federal Administrators Discretion To Determine When Funds Are "Available" To Pay CSCs

There is no question that, in the years in question, Congress did not give the Secretary enough money to pay for everything he wanted in his own agency, while fully honoring his statutory and contractual commitment to fund petitioners' CSCs. The question is who bears the burden of that shortfall.

The Tribes argue, and the Federal Circuit held (*see* 03-853 Pet. App. 16a), that the Secretary was required to fulfill

his contractual obligations first—even if doing so required either cutting his own bureaucracy or seeking a further appropriation. The Secretary argues, to the contrary, that he was entitled to set funds aside for his "inherently federal" functions, before deciding how much remained "available" to pay for direct tribal services and ISDA contracts. *See* 03-853 Pet. 24-25; *see also* 02-1472 Br. in Opp. 15-17. Yet a major focus of Congress's dissatisfaction with the Secretaries' implementation of ISDA in 1988 was the Secretaries' "diversion of tribal contract funds to pay for costs incurred by the Federal government." 1988 Rep. 30. Accordingly, the 1988 Amendments required inclusion of CSCs and other indirect costs in determining contract funding, and specifically directed that such funding "*shall not be reduced* to make funding available for contract monitoring or administration by the Secretary"; "*shall not be reduced* by the Secretary to pay for Federal functions including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring"; and "*shall not be reduced* by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract." 25 U.S.C. § 450j-1(b) (emphasis added).

Similarly, the House Conference Report accompanying the Interior and IHS appropriations bill for 1995—one of the years at issue here—directed the IHS to consult with Tribes to "address the [federal] organizational changes needed, such as closing and consolidating area offices and delegating area office and headquarters functions to the field, to free up funding for additional self-governance compacts in fiscal year 1995 and beyond." H.R. Conf. Rep. No. 103-740, at 51 (1994). And in 1994, when it ran out of patience with the Secretaries and prescribed its own form of ISDA contract, Congress included the special rule of construction requiring that "each provision" of both the ISDA and the prescribed contract "shall be liberally construed . . . to transfer . . . funding and . . . related functions, services, activities, and programs . . . , *including all related administrative functions*,

from the Federal Government to the [tribal] Contractor." 25 U.S.C. § 450*l*(c), sec. 1(a)(2) (emphasis added).

Consistently, Congress's focus has been on transferring administrative functions to Tribes and reducing—not protecting—federal administration. *See also* pp. 11-14, 17-18, *supra*. The statute and its history make clear that contract support costs are non-discretionary items, and that Congress wants the Secretaries to fund tribal administration in preference to its own administrative operations. In that light, it is difficult to credit the Secretary's current argument that Congress intended the determination of what appropriated funds are "availab[le]" to fund contracts under 25 U.S.C. § 450j-1(b) to begin only after the Secretary has already made whatever he considers adequate provision for "federal functions." *See* 03-853 Pet. 24.

C. In The Absence Of Specific Congressional Action, The Risk Of A Shortfall In Overall Appropriations Should Be Borne By The Secretaries, Not By Tribes

In the end, the Secretary argues bluntly that the ISDA "place[s] the risk of insufficiency [of appropriations] *on petitioners*" and other contracting Tribes. 02-1472 Br. in Opp. 19. If that argument referred to congressional action specifically limiting appropriations for use in paying petitioners, or in funding CSCs, it might have more force—despite the expressly contractual nature of the government's obligations. But as petitioners demonstrate, the appropriations at issue in this case were not so limited. What the Secretary has in mind instead is the risk that his agency's overall appropriation may be insufficient, not to pay petitioner's CSCs, but to pay them while also paying for everything else that the Secretary considers an equal or higher priority.

In that regard, the Secretary is correct in noting at least the theoretical relevance of the ISDA's provision that "the Secretary is not required to reduce funding for programs . . . serving a tribe to make funds available to another tribe" through an ISDA contract. 25 U.S.C. § 450j-1(b). But the Secretary must bear the burden of showing—not just assert-

ing—that he has both properly invoked that provision, and demonstrated its applicability on a given set of facts. *Cf. id.* § 450f(e)(1). The better time for the Secretary to raise the reduction clause as an impediment to "mak[ing] funds available" to petitioners under the ISDA, in the amount otherwise required by the Act, would have been *before* he had contractually committed himself to pay the full amount, or otherwise at a time when the Tribe could still obtain a timely hearing, including judicial review, to explore the relevant factual and legal issues. *Cf. id.* § 450f(a)(2)(D) and (b), 450m-1(a). That was not done here. In any event, in this case the Federal Circuit considered this question and concluded that amounts the Secretary reserved for "inherently federal functions," and amounts unexpended at the end of the relevant years, "clearly [did] not fall under this restriction," and together were "more than sufficient" to allow the Secretary to pay petitioners' CSCs. 03-853 Pet. App. 32a. There is no reason for this Court to revisit that fact-bound determination.

More generally, under the Secretary's apparent logic, the risk of any overall shortfall in appropriations would fall first and foremost on ISDA contracting Tribes; then, in the Secretary's discretion, on the non-contracting Tribes benefiting from program funding that the Secretary is "not required" to reduce in favor of ISDA contract funding, 25 U.S.C. § 450j-1(b); and *only then* on any portion of the Secretary's own administrative funding. That hypothetical result is no less "absurd" than the one the Secretary posits if he is required to honor his ISDA contracts under the "availability" clause. *See* 03-853 Pet. 24. Indeed, preferring federal administrative funding to tribal funding in the manner that the Secretary advocates would plainly be *less* consistent with the congressional intentions expressed in the text and history of the ISDA.

Finally, placing the principal risk of appropriation shortfalls on the Secretary, rather than on ISDA-contract Tribes, is functionally appropriate. It is, after all, the Secretary who ultimately requests and receives appropriations from

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Congress—and who has the best access to information concerning the full amount needed to fund his own necessary administrative functions, the services he provides to Tribes directly, and the services and administrative responsibilities that have been transferred to contracting Tribes under the ISDA. And putting the Secretary's administrative budget at some risk gives the agencies an incentive to act.[12]

Recognizing these realities, Congress in the ISDA required the Secretaries to provide annual reports concerning the need for funding—specifically including funding for contract support costs. 25 U.S.C. § 450j-1(c). (So far as the NCAI is aware, the Secretary has never complied with that requirement.) The Senate Indian Affairs Committee also repeatedly called on both Secretaries to request appropriations that would fully fund their obligations under the ISDA, and criticized them for not doing so. *See, e.g.*, 1988 Rep. 9, 14. Congressional appropriators urged reductions in federal adminsitrative costs, in order to free up funds to pay tribal CSCs. *See* p. 24, *supra*. And in the end, Congress enacted statutory provisions that clearly make the Secretaries' ISDA obligations judicially enforceable, specifically including through money damages or injunctions to compel payment of amounts due.[13] The clear import of the ISDA's pro-

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[12] Indeed, once it became clear that Tribes might in fact enforce their ISDA rights, the agencies *did* go back to Congress. *See, e.g.*, 03-853 Pet. 20-23 (discussing Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-2688 (1998)). True to form, what they sought was protection for their own operations, rather than for contracting Tribes. Nonetheless, the agencies' interest in, and ability to procure, congressional action amply demonstrates the efficacy of the incentive created by the ISDA's mandatory funding and enforcement provisions. It also shows the relative advantage that the agencies have in obtaining specific decisions from Congress concerning how to rebalance future financial commitments, if and when it is necessary to do so.

[13] The Secretary has argued in passing (03-853 Pet. 22 n.9; 02-1472 Br. in Opp. 25 n.9) that money damages are not available to petitioners, because any appropriations have been exhausted and petitioners could not be paid from the Judgment Fund, 31 U.S.C. § 1304. As the Federal Cir-

visions and history is that, as between either Secretary and an ISDA Tribe, in the absence of some more specific congressional action, and so long as appropriations are legally "available" to satisfy contractual commitments under the ISDA, Congress placed the risk of any overall budgetary shortfall squarely on the Secretary—not the Tribes.

CONCLUSION

The judgment of the Tenth Circuit in No. 02-1472 should be reversed. The judgment of the Federal Circuit in No. 03-853 should be affirmed.

Respectfully submitted,

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cuit held, however, there was ample statutory authority for the agency to contract to pay petitioners' contract support costs—and Congress clearly made any such contract enforceable against the government. *See* 03-853 Pet. App. 34a-35a; 25 U.S.C. § 450m-1(a) (authorizing district courts to award "appropriate relief including money damages"), (d) (applicability of Contract Disputes Act); 41 U.S.C. § 612(a)-(b) (allowing for "judgments" and "monetary awards"). There is no reason that any award resulting from such a proceeding should not be payable in the ordinary course from the Judgment Fund—whether or not the Secretary presently has any resources that could lawfully be used to reimburse that Fund. The Contract Disputes Act expressly contemplates that agencies may need to seek supplemental appropriations in order to reimburse the Judgment Fund after losing a case. *See* 41 U.S.C. § 612(c) ("Payments made pursuant to subsections (a) and (b) shall be reimbursed to the fund provided by section 1304 of title 31, United States Code, by the agency whose appropriations were used for the contract out of available funds *or by obtaining additional appropriations for such purposes.*" (emphasis added)). In any event, in practice an agency "need not disrupt ongoing programs or activities in order to find the money [to reimburse the Judgment Fund]. If this were not the case Congress could have just as easily directed the agencies to pay the judgments and awards directly." General Accounting Office, 3 *Principles of Federal Appropriations Law*, ch. 12, at 78 (2d ed. 1994). Perhaps for that reason, most contract damages paid out of the Judgment Fund are never actually reimbursed. *See id.* ch. 13, at 20.

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APPENDIX

STATUTORY PROVISIONS

Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203. (Codified as amended at 25 U.S.C. §§ 450 *et seq.*)

* * * *

DECLARATION OF POLICY

SEC. 3. (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

* * * *

CONTRACTS BY THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

SEC. 103. (a) The Secretary of Health, Education, and Welfare is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to carry out any or all of his functions, authorities, and responsibilities under the Act of August 5, 1954 (68 Stat. 674), as amended: *Provided, however,* That the Secretary may initially decline to enter into

any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted for will not be satisfactory; (2) adequate protection of trust resources is not assured; or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: *Provided further*, That the Secretary of Health, Education, and Welfare, in arriving at his finding, shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance.

(b) Whenever the Secretary of Health, Education, and Welfare declines to enter into a contract or contracts pursuant to subsection (a) of this section, he shall (1) state his objections in writing to the tribe within sixty days; (2) provide, to the extent practicable, assistance to the tribe or tribal organization to overcome his stated objections; and (3) provide the tribe with a hearing, under such rules and regulations as he shall promulgate, and the opportunity for appeal on the objections raised.

* * * *

ADMINISTRATIVE PROVISIONS

SEC. 106. (a) Contracts with tribal organizations pursuant to sections 102 and 103 of this Act shall be in accordance with all Federal contracting laws and regulations except that, in the discretion of the appropriate Secretary, such contracts may be negotiated without advertising and need not conform with the provisions of the Act of August 24, 1935 (49 Stat. 793), as amended: *Provided*, That the appropriate Secretary may waive any provisions of such contracting laws or regulations which he determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of this Act.

* * * *

(h) The amount of funds provided under the terms of contracts entered into pursuant to sections 102 and 103 shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract: *Provided*, That any savings in operation under such contracts shall be utilized to provide additional services or benefits under the contract.

PROMULGATION OF RULES AND REGULATIONS

SEC. 107. (a) The Secretaries of the Interior and of Health, Education, and Welfare are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this title.

* * * *

REPORTS

SEC. 108. For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract or grant under this title, the Indian tribe which requested such contract or grant shall submit to the appropriate Secretary a report including, but not limited to, an accounting of the amounts and purposes for which Federal funds were expended, information on the conduct of the program or service involved, and such other information as the appropriate Secretary may request.

* * * *

The ISDA as amended by the Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285.

DECLARATION OF POLICY

[Section 102 of the 1988 Amendments, 102 Stat. 2285, amended ISDA Section 3(b). 25 U.S.C. § 450a (1988). The new language is shown in italics.]

SEC. 3 (b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, *individual Indian tribes and to* the Indian people *as a whole* through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from *the* Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. *In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.*

* * * *

REPORTING AND AUDIT REQUIREMENTS

[Section 208 of the 1988 Amendments, 102 Stat. 2296, amended ISDA Section 108 and redesignated it as section 5(f). 25 U.S.C. § 450c(f) (1988). New language is shown in italics.]

SEC. 5. (f) For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract or grant under this title, the Indian tribe which requested such contract or grant shall submit to the appropriate Secretary a report including, but not limited to, an accounting of the amounts and purposes for which Federal funds were expended, information on the conduct of the program or service involved, and such other information as the appropriate Secretary may request *through regulations promulgated under sections 552 and 553 of title 5, United States Code.*

* * * *

SELF-DETERMINATION CONTRACTS

[Section 201 of The 1988 Amendments, 102 Stat. 2288, combined ISDA Sections 102 and 103 into a new Section 102, with substantial revisions. 25 U.S.C. § 450f (1988). Italics are used to emphasize particular new material.]

SEC. 102. (a)(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended;

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended;

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract to the Secretary for review. The Secretary shall, within ninety days after receipt of the proposal, approve the proposal unless, within sixty days of receipt of the proposal, a specific finding is made that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured; or

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(b) Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing *on the record* and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate.

* * * *

CONTRACT FUNDING AND INDIRECT COSTS

[Section 205 of the 1988 Amendments, 102 Stat. 2292, added a new ISDA Section 106. 25 U.S.C. § 450j-1 (1988).]

SEC. 106. (a)(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act hall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which -

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3) Any savings in operation under a self-determination contract shall be utilized to provide additional services or benefits under the contract or be expended in the succeeding fiscal year as provided in section 8 of this Act.

(b) The amount of funds required by subsection (a) —

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to —

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c).

Notwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act.

* * * *

PROMULGATION OF RULES AND REGULATIONS

[Section 207 of the 1988 Amendments, 102 Stat. 2295, amended ISDA Sections 107(a) and (b). 25 U.S.C. § 450k (1988). The new language is shown in italics.]

SEC. 107. (a) The Secretaries of the Interior and of *Health and Human Services* are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this title: *Provided, however, That all Federal requirements for self-determination contracts and grants under this Act shall be promulgated as regulations in conformity with sections 552 and 553 of title 5, United States Code.*

* * * *

(b)(3) Within *seven* months from the date of enactment of *the Indian Self-Determination and Education Assistance Act Amendments of 1988*, the Secretary shall publish proposed regulations in the Federal Register for the purpose of receiving comments from tribes and other interested parties.

(4). Within ten months from the date of enactment of the *Indian Self-Determination and Education Assistance Act Amendments of 1988*, the Secretary shall promulgate regulations to implement the provisions of *such Act.*

CONTRACT APPEALS

[Section 206 of the 1988 Amendments, 102 Stat. 2294, added a new ISDA Section 110. 25 U.S.C. § 450m-1 (1988).]

SEC. 110 (a) The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder.

(b) Unless otherwise agreed to by the resolution of an Indian tribe, the Secretary shall not revise or amend a self-determination contract with such tribe.

(c) The Equal Access to Justice Act (Public Law 96-481, Act of October 1, 1980; 94 Stat. 2325, as amended), shall apply to administrative appeals by tribal organizations regarding self-determination contracts.

(d) The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts.

* * * *

The ISDA as amended by The Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, Tit. I, 108 Stat. 4250.

REPORTING AND AUDIT REQUIREMENTS

[Section 102(2) of the 1994 Amendments, 108 Stat. 4250, amended ISDA Section 5(f) to read as follows. 25 U.S.C. § 450c (1994).]

SEC. 5. (f)(1) For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract entered into, or grant made, under this Act, the tribal organization that requested such contract or grant shall submit to the appropriate Secretary a single-agency audit report required by chapter 75 of title 31, United States Code.

(2) In addition to submitting a single-agency audit report pursuant to paragraph (1), a tribal organization referred to in such paragraph shall submit such additional information concerning the conduct of the program, function, service, or activity carried out pursuant to the contract or grant that is the subject of the report as the tribal organization may negotiate with the Secretary.

(3) Any disagreement over reporting requirements shall be subject to the declination criteria and procedures set forth in section 102.

* * * *

SELF-DETERMINATION CONTRACTS

[Sections 102(5), (6), (7) and (9) of the 1994 Amendments, 108 Stat. 4252, amended ISDA Section 102 subsections (a), (b), and (e). 25 U.S.C. § 450f (1994). The new language is shown in italics.]

SEC. 102. (a)(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

* * * *

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, *or a proposal to amend or renew a self-determination contract,* to the Secretary for review. *Subject to the provisions of paragraph (4),* the Secretary shall, within ninety days after receipt of the proposal, approve the proposal *and award the contract* unless, *the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that —*

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a); or

(E) the program function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

* * * *

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal—

(A) proposes in part to plan, conduct or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or

(B) proposes a level of funding that is in excess of the applicable level under section 106(a),

subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 106(a). If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) shall only apply to the portion of

the contract that is declined by the Secretary pursuant to this subsection.

* * * *

(b) Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

* * * *

(3) provide the tribal organization with a hearing on the record *with the right to engage in full discovery relevant to any issue raised in the matter* and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, *except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 110(a).*

* * * *

(e)(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3), the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

* * * *

CONTRACT FUNDING AND INDIRECT COSTS

[Section 102(14) of the 1994 Amendments, 108 Stat. 4257, amended ISDA Section 106(a) to read in part as follows. 25 U.S.C. § 450j-1 (1994). The new language is shown in italics.]

SEC. 106. (a)(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, *without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.*

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of *an amount for* the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which -

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of —

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in

connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under section 106(a).

* * * *

CONTRACT APPEALS

[Section 104(2) of the 1994 Amendments, 108 Stat. 4268, amended ISDA Section 110(a) to read as follows. 25 U.S.C. § 450m-1 (1994). The new language is shown in italics.]

SEC. 110. (a) The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder *(including immediate injunctive relief to reverse a declination finding under section 102(a)(2) or to compel the Secretary to award and fund an approved self-determination contract).*

* * * *

PROMULGATION OF RULES AND REGULATIONS

[Section 105 of the 1994 Amendments, 108 Stat. 4269, amended ISDA Section 107 to read in part as follows. 25 U.S.C. § 450k (1994).]

SEC. 107. (a)(1) Except as may be specifically authorized in this subsection, or in any other provision of this Act, the Secretary of the Interior and the Secretary of Health and Human Services may not promulgate any regulation, nor impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts, except that the Secretary of the Interior and the Secretary of Health and Human Services may promulgate regulations under this Act relating to chapter 171 of title 28, United States Code, commonly known as the 'Federal Tort Claims Act', the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.), declination and waiver procedures, appeal procedures, reassumption procedures, discretionary grant procedures for grants awarded under section 103, property donation procedures arising under section 105(f), internal agency procedures relating to the implementation of this Act, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards, and financial management standards.

(2)(A) The regulations promulgated under this Act, including the regulations referred to in this subsection, shall be promulgated—

(i) in conformance with sections 552 and 553 of title 5, United States Code and subsections (c), (d), and (e) of this section; and

(ii) as a single set of regulations in title 25 of the Code of Federal Regulations.

(B) The authority to promulgate regulations set forth in this Act shall expire if final regulations are not promulgated

within 18 months after the date of enactment of the Indian Self-Determination Contract Reform Act of 1994.

* * * *